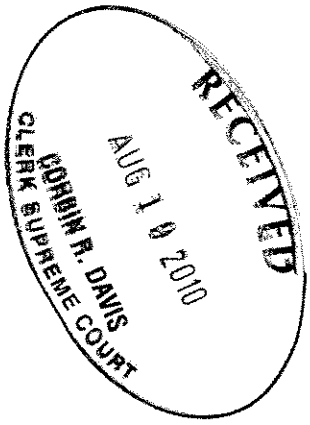
August 18, 2010



Corbin R. Davis
Clerk of the Court
Michigan Supreme Court
Michigan Hall of Justice
925 W. Ottawa, P.O. Box 30052
Lansing, MI 48909

Re: ADM File No. 2009-19

Dear Mr. Davis:

The State Bar of Michigan Appellate Practice Section Council thanks the Court for the opportunity to comment on ADM File No. 2009-19. The Council has carefully reviewed and discussed the proposed amendments.

Regarding the proposal to place a 1-year limitation period on motions for relief from judgment in criminal cases, some Council members are concerned that it will result in the filing of premature motions. As Stuart Friedman observed in his June 8, 2010 letter to the Court, there may very well be situations where a defendant arguably has sufficient facts to trigger the 1-year period, but yet not enough to establish a basis for relief. Under current practice, any undue delay in submitting a motion can be taken into account by the court deciding the motion. By imposing an artificial deadline, the proposed amendment will likely induce many attorneys to file a motion before completing investigation out of fear of missing the deadline.

Several Council members also expressed various concerns about the proposed amendments to MCR 7.204 and 7.205, which would shorten the time limits for bringing late appeals, whether in criminal or civil cases, to no more than 56 days for an appeal as of right and 42 days for an application for leave to appeal, and only upon a showing of "excusable neglect." Under the current rules, a party has 21 days to either file an appeal as of right (for final judgments or orders) or seek leave to appeal (for all other orders as to which an appeal as of right is not available), and then up to a total of 12 months to file a delayed application for leave to appeal.

Although a desire to achieve finality is understandable, numerous Council members believe that the proposed amendments will have the effect of arbitrarily and unfairly limiting access to the appellate courts. As an initial matter, the reduced time periods may not provide parties with an adequate opportunity to seek the advice of appellate counsel after being notified of an adverse judgment or order (which in many cases can be delayed by several weeks, if not longer). Moreover, while the current

rules provide a party with the opportunity to at least file a delayed application for leave to appeal, under the proposed amendments a party failing to bring a timely appeal as of right from a final judgment or order under the extended 56-day period would have no further ability to seek leave to appeal, regardless of the circumstances. Indeed, in some situations, a case may not be ripe for an appeal from an interlocutory order until a subsequent ruling or other event occurs months later. Adoption of the proposed amendments would render a delayed appeal an impossibility in such situations. This would be a significant departure from current practice and serve as a trap for the unwary. For these reasons, even those Council members inclined to support additional limitations on delayed appeals in principle expressed concern about the proposed amendments as written.

Additional difficulties are presented in criminal cases. As an initial matter, some Council members have suggested that it is not clear whether a late request for the appointment of appellate counsel may still be granted under the proposed amendments; to be sure, such appointments are not specifically prohibited. If late requests may be granted, it will be exceedingly difficult for a meaningful application for leave to appeal to be filed, even with the 21-day extension period. And in plea-based appeals, the proposed amendments are likely to result in the filing of unnecessary motions to withdraw the plea or for resentencing. Under current practice, preserved issues (such as an objection to the scoring of the sentencing guidelines) may be raised in the Court of Appeals by way of an application for leave to appeal filed within the 1-year limit. But under the time limitations established by the proposed amendments, otherwise preserved sentencing issues will have to be re-raised in the trial court in order to retain the right to file an application for leave to appeal from the denial of the motion.

Finally, several Council members expressed concerns about the proposed elimination of recently-adopted language in MCR 7.205(F) protecting parties in the event that a claim of appeal is subsequently dismissed for lack of jurisdiction. Under the proposed amendments, a delayed application for leave to appeal would no longer be available.

For all of these reasons, the Council unanimously voted to request that the Court decline to adopt the proposed amendments.

Again, we thank the Court for the opportunity to comment on the proposed rule amendments. If the Section can provide any additional assistance, please let us know.

Very truly yours,

Christina A. Ginter

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APPELLATE PRACTICE SECTION
Respectfully submits the following position on:

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ADMN File No. 2009-19

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The Appellate Practice Section is not the State Bar of Michigan itself, but rather a Section which members of the State Bar choose voluntarily to join, based on common professional interest.

The position expressed is that of the Appellate Practice Section only and is not the position of the State Bar of Michigan.

The State Bar's position on this matter is opposition.

The total membership of the Appellate Practice Section is 667.

The position was adopted after a discussion and vote at a scheduled meeting. The number of members in the decision-making body is 24. The number who voted in favor to this position was 16. The number who voted proposed to this position was 0.